

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11232 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE PRADIP KUMAR SARKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
Yes
 2. To be referred to the Reporter or not? Yes :
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
No
 5. Whether it is to be circulated to the Civil Judge? : NO
No

GUJARAT CANCER AND RESEARCH INSTITUTE (M P SHAH CANCER

Versus

KARUNABEN R MAKWAN

Appearance:

Mr. S.I. NANAVATI with Mr. Deepak G. Shukla for Petitioner
MR NR SHAHANI for Respondent No. 1

CORAM : MR.JUSTICE PRADIP KUMAR SARKAR

Date of decision: 07/07/2000

CAV JUDGEMENT

1. Smt. Karunaben R. Makwan has been working in the petitioner Gujarat Cancer And Research Institute, Ahmedabad, since 5-6-1972. There after she was promoted

as Sister-In-Charge in the petitioner institute. The respondent was not discharging her duty properly and she was in the habit of committing misconduct for which the petitioner issued several memos and notices in the past. The respondent workwoman was served with a charge sheet for committing very serious misconduct and consequently she was dismissed from service. The respondent therefore preferred Reference (I.T.) No. 132 of 1983 before the Industrial Tribunal. Respondent also preferred Special Civil Application before the High Court. However, as per consent terms arrived at between the parties the respondent was reinstated in service w.e.f. 20-12-1983 with back wages, but three increments were withheld. Past record of the respondent workwoman is admittedly not clean and spotless, and she was given ample opportunities in past to improve but there was no sign of improvement and she continued to commit serious misconduct. Thereafter the respondent workwoman was served with charge sheet on 21-8-1987 in connection with an incident that had occurred in the Endoscopy operation theatre during the course of operation of necknode biopsy of an eight year old child and her reply was not found satisfactory. The petitioner institute decided to hold departmental inquiry against her. In the departmental inquiry the respondent was found guilty to the charges framed against her and resultantly her services were terminated by the management vide order dated 21-5-1988.

2. The respondent workwoman therefore raised industrial dispute challenging her termination which was referred to the Labour Court at Ahmedabad being Reference (LCA) No. 1646 of 1988. The respondent submitted statement of claim on 21-12-1992, that is after about 4 years and the petitioner institute submitted its written statement on 12-4-1993. In the proceedings before the Labour Court papers were produced by the petitioner institute regarding the domestic inquiry. Past record of the respondent workwoman was also submitted before the Labour Court. During the said proceedings the petitioner institute submitted detailed papers/ documents regarding earlier misconducts committed by the respondent workwoman which are marked as Annexure-G collectively. Before the Labour Court it was alleged in the written statement of the petitioner institute that, a complaint was filed against the respondent for assaulting one Shri. Narendra Varma, and the Chief Metropolitan Magistrate, Ahmedabad by order dated 29-9-1984 held that the respondent is guilty of offence under Sec. 114 read with Sec. 323 of I.P. Code and she was fined Rs.100/-. Feeling aggrieved by the above order, respondent filed an appeal against the order of Chief Metropolitan Magistrate, but the

appellate Court acquitted the respondent.

3. Before the Labour Court the petitioner institute as well as respondent adduced both oral and documentary evidence. The Labour Court after considering evidence, both oral and documentary, passed the award on 9-4-1997. It was published on 24-6-1997 and the same was received by the petitioner institute on 11-7-1997. The Labour Court set aside the order of dismissal of the respondent and directed the petitioner institute to reinstate the respondent on her original post with continuity of service with full back wages, and also awarded Rs.1000-00 as cost. Having felt aggrieved by the judgment & award of the Labour Court, the petitioner institute filed the present Special Civil Application before this Court.

4. By issuing rule, this Court stayed the implementation of the judgment & award of the Labour Court so far it relates to payment of full back wages. It was submitted by learned counsel for the petitioner before the Court that the respondent will be reinstated in terms of the award of the Labour Court w.e.f. 1-9-1997, and accordingly respondent was reinstated in service. The aforesaid petition was thereafter adjourned and lastly it had come up for hearing on 13-4-1998 and this Court by an order dated 13-4-98 set aside the award of the Labour Court so far as it relates to payment of backwages and remanded the matter to the Labour Court to consider the question of back wages afresh. The petitioner submitted copy of the letter received from Gujarat Research & Medical Institute about the gainful employment of the respondent before the Labour Court along with list of documents on 29-6-98. The details about the salary paid to the respondent employee was mentioned in the said letter. While the matter was pending before the Labour Court, petitioner institute requested to grant some time to produce report of the Investigating Agency about gainful employment of the respondent employee and on objection by counsel of the respondent, Labour Court has closed the stage of oral evidence by an order dated 20-7-98. Thus the petitioner institute was denied the opportunity of producing records regarding gainful employment of the respondent. The Labour Court by judgment & award dated 29-8-1998 directed the petitioner institute to pay full back wages from 21-5-1988 to 31-8-1997, subject to deduction of Rs.3050-10 to the respondent. Having felt aggrieved by the said judgment & award of the Labour Court passed on 29-8-1998, petitioner institute has filed the present Special Civil Application.

5. Learned Sr. counsel Mr. S.I.Nanavati appearing on behalf of the petitioner institute submitted that, the respondent has already been reinstated in service w.e.f. 1-9-1997, and therefore present dispute is only in respect to payment of back wages to the respondent workwoman. Learned counsel submitted that the Labour Court while passing the award did not take in to consideration the past conduct of the respondent. Learned counsel further submitted that the payment of full back wages subject to deduction of Rs.3050-10 will mean that the termination of the petitioner for committing serious misconduct is only unjustified. Learned counsel submitted that the respondent in her evidence admitted the misconduct committed by her as well the fact that the patient had died after about a week of the operation. She has also admitted in her evidence that she was working in the operation theatre of the institute for more than 15 days before the date of incident took place. Learned counsel consequently submitted that when the respondent herself had admitted the misconduct, it cannot be said that her termination was wholly unjustified or illegal and therefore the Labour Court has committed serious error in awarding the full back wages to the respondent. It is further argued by learned counsel for the petitioner that the Labour Court also came to the conclusion that there was misconduct on the part of the respondent by giving a stab knife in place of skin knife while surgeon was conducting operation on a 8 year old boy for biopsy. However, the Labour Court has taken a lenient view that giving stab knife in stead of skin knife in a biopsy operation do not endanger life of a patient, and therefore punishment of dismissal from service was disproportionate to the offence alleged to have been committed by the respondent. Accordingly learned counsel for the petitioner submitted that, taking a lenient view the Labour Court has passed the order for reinstatement of the respondent with full back wages. It is argued by learned counsel for the petitioner that, when the charges levelled against the respondent has been proved and when after taking a lenient view the Labour Court has passed order for reinstatement, it was improper and illegal on the part of the Labour Court in directing the petitioner institute to pay full back wages to the respondent. It is argued by learned counsel for the petitioner that, when the Labour Court has found that there was negligence on the part of respondent workwoman, it should not have awarded full back wages to the respondent.

6. Learned counsel for the petitioner has further argued that the Labour Court, Ahmedabad, registered the

Reference in the year 1988 and the respondent has submitted her statement of claim on 21-12-1992, that is after four years from the date of reference. Learned counsel consequently submitted that since the respondent has delayed the proceedings before the Labour Court by four years she should not have been allowed any back wages for the aforesaid four years. Learned counsel for the petitioner has also argued that while making award for payment of full back wages the Labour Court did not take into consideration the past misconduct of the respondent. Learned counsel submitted that earlier respondent was dismissed from service on 20-12-1983 for her serious misconduct. However, as per the consent terms arrived at between the parties the respondent workwoman was reinstated in service w.e.f. 20-12-83, but her three increments were withheld. It is submitted by learned counsel for the petitioner that, apart from the punishment of withholding three increments the respondent was warned and cautioned for several times for her misconduct. It is submitted by learned counsel that, past record of the respondent was submitted before the Labour Court, which is also annexed and marked Annexure-G collectively to the present petition. Drawing attention to the contents at Annexure-G, learned counsel submitted that in past on several occasions the respondent was warned and she was cautioned and was asked to improve her performance. It is submitted by learned counsel for the petitioner that, before the present dismissal, the respondent was warned and cautioned and penalised on 32 occasions. In spite of that the respondent did not improve her performance. Learned counsel consequently submitted that before awarding full back wages the Labour Court should have considered the past conduct of the respondent and should not have allowed full back wages to the respondent. There is sufficient force in the submissions of learned counsel for the petitioner. A perusal of the award passed by the Labour Court would show that the petitioner institute has been able to successfully prove the charges levelled against the respondent by adducing evidence before the Labour Court. This finding recorded by the Labour Court can be seen from the following observations made by it in the impugned award.

" I am also convinced with the submission of the learned representative of the second party Shri K.T. Trivedi that supposing the second party has committed the mistake during the operation of supplying stab knife instead of skin knife, but the said mistake is a bonafide mistake, which may not result into a serious trouble to the patient,

perhaps it may give some physical trouble to the patient, and for which the punishment of termination of service is not an appropriate punishment, it is a very harsh punishment. "

After holding that the respondent has committed the mistake the Labour Court proceeded to examine the question as to whether the punishment of dismissal awarded to the workwoman is justified in view of the misconduct alleged against her, and came to the conclusion that the punishment of dismissal awarded to the respondent was very harsh and accordingly quashed the order of dismissal and ordered to reinstate the respondent in her original post with continuity of service and full back wages.

7. It is an admitted fact that the respondent has been reinstated in service w.e.f. 1-9-1997 and the learned counsel for the petitioner very fairly submitted that so long the respondent discharges her duties faithfully, honestly and diligently the petitioner institute will not take any action against the respondent. Thus, the only question to be decided in the present petition is as to whether the Labour Court was right in holding that the respondent is entitled to full back wages, subject to deduction of Rs.3050-10, during which time she was gainfully employed. Challenging this part of the award Mr. Nanavati, learned advocate for the petitioner argued that, once the charge of misconduct was proved as per the findings recorded by the Labour Court itself, it cannot be said that the termination was wholly unjustified. He further argued that the Labour Court misdirected itself in holding that the mistake made by the respondent is bona fide and it is not of serious mistake as it does not endanger the life of a patient. Learned counsel further submitted that the respondent was earlier punished by withholding of three increments and she was warned and cautioned every time. Learned counsel consequently submitted that it was not proper on the part of the Labour Court to give full back wages to the respondent as that would mean that the respondent has not committed any misconduct. Learned counsel consequently submitted that taking a sympathetic view the petitioner institute has already reinstated the respondent in service from 1-9-1997. But since she has not been fully exonerated by the Labour Court and since her termination was not held to be wholly unjustified, the Labour Court committed an error and illegality in passing the order for reinstatement with full back wages to the respondent. Learned counsel consequently submitted that having regard to the past misconduct of the respondent and having

regard to the fact that the charges levelled against the respondent has been proved, and also considering the fact that the respondent has made delay of four years in submitting her statement of claim before the Labour Court, the award for payment of full back wages should be quashed.

8. As against the aforesaid submissions of learned counsel for the petitioner institution, learned counsel Mr. Shahani for the respondent workwoman contended that the Labour Court has exercised its discretion under Sec. 11-A of the I.D. Act in coming to the conclusion that the punishment awarded was disproportionate to the charges levelled against the respondent, and this Court should not interfere with the exercise of such discretion in a petition filed under Article 226 with Article 227 of the Constitution. In this connection learned counsel draws my attention to a case in MOHD. YUNUS Vs MOHD. MUSTAQUIM & ORS., reported in A.I.R. 1984, pg. 38, wherein it was observed that, a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Art. 227. The supervisory jurisdiction conferred on the High Courts under Art. 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal function within the limits of its authority", and not to correct an error apparent on the face of the record, much less an error of law. In exercising the supervisory power under Art. 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision.

Learned counsel for the respondent accordingly submitted that the Labour Court has passed an order for payment of back wages, subject to certain deduction and that cannot be interfered by this Court in exercising power under Article 227 of the Constitution. Learned counsel also argued that the petitioner institute has taken the stand regarding past conduct of the respondent for the first time and that was not agitated before the Labour Court. It is also argued by learned counsel for the respondent that the Labour Court has come to the conclusion that because of the earlier litigation the Labour Court found that the order of dismissal was passed out of vengeance. It was on this consideration Labour Court has come to the finding that the punishment imposed on the respondent was disproportionate to the offence alleged to have been committed by the respondent, and accordingly the Labour Court has reinstated the

respondent with full back wages and these findings cannot be interfered with by the High Court at this stage.

9. I have given my due consideration to the respective arguments of both the learned counsels. I have also gone through the records of the case. On perusal of the records and the award passed by the Tribunal, it appears that the earlier misconduct of the respondent workwoman was submitted by the petitioner institute before the Labour Court which is marked Annexure-G collectively to the present petition. It is to be borne in mind at this juncture that the petitioner was earlier imposed a penalty of withholding of three increments for her misconduct and she has at her own will consented to such penalty in the earlier settlement before this Court. While interfering with the punishment of dismissal it appears that the Labour Court was influenced by the fact that, there were earlier litigation between the parties and because of those earlier litigations the petitioner has imposed penalty of dismissal of the respondent from service. I am afraid, the reasons given by the Labour Court are misplaced while observing that the management has taken a severe step because of earlier litigation. However the Labour Court ignored the relevant aspect of the case that the disciplinary authority had imposed penalty upon the respondent looking to the previous conduct of the respondent. She was given sufficient warnings and memos for dereliction of her duties. She has even accepted stoppage of three annual increments for misconduct. The averments of the petitioner institute regarding earlier misconduct remained unrebutted by the respondent. Thus it is evident that the respondent has admitted the earlier misconduct committed by her. This say of the petitioner institute that the disciplinary authority took in to consideration the past record while awarding punishment of dismissal therefore stands unrebutted. In view of this position the Labour Court was not right in holding that because of the earlier litigation the petitioner was punished with the order of dismissal. The misconduct committed by the respondent was admitted by the Labour Court, but the Labour Court had observed that the mistake on the part of the respondent was bone fide and it was not a serious mistake which can endanger the life of a patient. Therefore, I am of the view that the Labour Court has committed a serious mistake in awarding full back wages to the respondent. However it is admitted by the respondent that while the surgeon was performing operation, respondent has supplied stab knife instead of skin knife to the surgeon. Considering all these facts, I am of the view that the Labour Court took

support of invalid grounds in holding that the punishment imposed upon the respondent was very harsh or disproportionate. In the above facts & circumstances, the only point is to be considered is, whether the Labour Court was correct in awarding full back wages to the respondent as the petitioner did not challenge the order of reinstatement in view of the fact that the petitioner has already reinstated the respondent in service w.e.f. 1-9-1997. There is yet another aspect of the matter which has to be high-lighted at this stage. The Labour Court has committed serious error even in granting the relief while setting aside the punishment of dismissal. Although the Labour Court held the charges as proved against the workwoman, but while concluding (though erroneously) Labour Court has opined that the 'punishment of dismissal was very harsh and disproportionate', and the workwoman was given the relief of reinstatement with full back wages. The effect of giving this relief is to let off the respondent completely with no order of punishment even when the charges against the workwoman stands proved. This is clearly an erroneous approach. No doubt under section 11-A of the I.D. Act, Labour Court has power to set aside the order of discharge or dismissal and direct reinstatement after being satisfied that the order of dismissal or discharge was not justified. Further, the Labour Court can exercise discretion under section 11-A of the I.D. Act while examining the question as to whether the punishment imposed upon the workwoman by the employer is commensurate with the gravity or the act of misconduct and can impose lesser punishment. However such discretion is to be exercised judiciously and on the basis of relevant consideration. The Labour Court in the instant case was influenced by wrong consideration and ignored relevant consideration about seriousness of misconduct. The earlier penalty of withholding of three increments were admitted by the respondent. In the instant case also the misconduct of the respondent was proved. Thus it is established on record that the respondent had been committing misconducts repeatedly. In the instant case it was not held by the Labour Court that the termination was wholly unjustified, but taking a lenient view and exercising discretion under sec. 11-A of the I.D. Act, the Labour Court has passed order for reinstatement. While deciding the question of back wages the Labour Court should have considered the past conduct of the respondent as well as the fact from the present case also. The Labour Court was influenced by the fact that the misconduct committed by the respondent was not a serious one and it is a bona fide mistake and accordingly awarded full backwages. This is clearly a wrong approach

on the part of the Labour Court. Whether a particular misconduct is severe or otherwise is dependent upon the fact of each particular case. A misconduct which may not give, in certain circumstances, to be serious, but it can be serious in another set of circumstances. In the instant case the respondent was working as a Staff Nurse in the operation theatre. The Surgeon was conducting operation of biopsy on a eight year old boy. Supply of wrong scissor could have a serious effect on the patient, and in fact in the instant case the boy died after seven days of the operation. Therefore, I am of the view that the Labour Court has committed a serious error in granting relief of full back wages to the respondent. It is true that the Labour Court can exercise its discretion under Sec. 11-A of the I.D. Act, while examining the question as to whether the punishment imposed upon the workwoman by the employer is commensurate with the act of misconduct and can impose lesser punishment. But such discretion is to be exercised judiciously and on the basis of relevant findings. The Labour Court in the instant case was influenced by a wrong consideration and has awarded full back wages to the respondent. Unless the order of dismissal of an employee is found to be wholly unjustified, payment of full back wages should not be awarded. In the instant case it cannot be said that the dismissal of the respondent was wholly unjustified. The termination of the respondent was quashed by the Labour Court considering the fact that the punishment imposed is disproportionate to the misconduct alleged against the respondent. Therefore I am of the view that the Labour Court should not have awarded full back wages to the respondent. I do not like to make any observation regarding order of reinstatement as the learned counsel for the petitioner has very fairly submitted that they have already reinstated the respondent in service. But so far as the backwages is concerned, I am of the clear view that the Labour Court has wrongly exercised its discretion in awarding full back wages to the respondent.

10. Having regard to the facts and circumstances of the case, and after perusing the records and evidences of the case, and considering the past conduct of the respondent; I am of the view that the respondent is not entitled to full backwages. Since the order of dismissal of respondent was not wholly unjustified, she cannot get full back wages for the period during which she did not work. After considering all the facts & circumstances of the case, and considering the past conduct of the respondent, I am of the view that payment of thirty percent (30 %) of back wages will be just and proper and will meet the ends of justice. Accordingly the award of

the Labour Court so far as it relates to the payment of back wages is modified to the extent that the respondent workwoman will be entitled to only 30 % of the back wages from the date of termination, till the date of her reinstatement in service, subject to deduction of Rs.3050-10 which she has earned during this period. The petitioner is accordingly directed to pay 30 % back wages to the respondent workwoman, subject to deduction of Rs.3050-10, within one month from the date of receipt of this order. Subject to the aforesaid modification in the award of the Labour Court this petition is partly allowed. Rule made absolute to the aforesaid extent. However, I make no order as to costs.

Dt: -07-2000

(P.K. Sarkar, J)

/vgn